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No. 99-879

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALI MOGHADAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE COALITION FOR THE PRESERVATION OF PERFORMED MUSIC IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE IN THIS CASE

Amicus curiae, the Coalition for the Preservation of Performed Music, is a coalition of individuals and organizations interested in preserving and promoting public access to copyrightable intellectual property, such as the live musical performances at issue in this case, for the purposes of scholarship and personal edification.[1] *Amicus curiae* include attorneys, law professors, musicians, music scholars, university librarians, and others who are rare musical performance enthusiasts. *Amicus curiae* is sensitive to this Court's concerns, articulated in Supreme Court Rule 37.1, regarding the burden of redundant briefing.[2] Our brief highlights significant relevant legal argument which has not been effectively articulated in these proceedings yet should be of assistance to the Court.

This *amicus* brief sets forth our considered views regarding the public interest which prompted the drafting of the Copyright Clause and continues to be served by copyright jurisprudence developed pursuant to that Clause. We are concerned that the briefing throughout this litigation, including Petitioner's Petition for Writ of Certiorari, has not meaningfully articulated this public interest, how the Copyright Clause was created to protect this interest, or the specific subject matter to which this

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[1] Rule 37.6 Disclosure: Counsel for Amicus authored this brief in its entirety and submitted this brief without any assistance, participation, or monetary contribution from any party in this case.

[2] Rule 37.2(a) Disclosure: Written consent to file this brief has been received from both parties in this case and copies are attached.

interest pertains. It is our view that only by considering the unique and specific subject matter contemplated by the Copyright Clause can the exclusive nature of the authority conferred by the Clause be recognized. We believe the Eleventh Circuit decision misconstrues these fundamental principles of copyright jurisprudence, and, as a consequence, inadvertently yet dramatically undermines the public interest served thereby. We are determined to forestall any further erosion of this interest by vigorously arguing its merits while there is still an opportunity to do so.

The Eleventh Circuit decision presents a novel and important question of federal law which requires the attention of this Court. The decision marks a significant and, we believe, erroneous departure from long-standing copyright jurisprudence, in conflict with decisions by this Court and the federal statutory copyright scheme. In addition, the decision dramatically expands the scope of Congress' Commerce Clause authority at the expense of the Copyright Clause and the important public interests that clause was intended to protect. At issue here is nothing less than the future course of American copyright law. This case will either trigger the eclipse of copyright before an expanding Commerce Clause or it will reaffirm the unique legal structure created under copyright to protect the public interest served by limiting exclusive rights in original works of authorship. The pending Petition for Writ of Certiorari should be granted, the Eleventh Circuit decision reversed, and 18 U.S.C. § 2319A found unconstitutional.

SUMMARY OF ARGUMENT

The Copyright Clause establishes a careful balance between conflicting public and private interests in a specific type of intellectual property, namely, original works of authorship. In light of the complex balance of interests created under the Copyright Clause, it is a mistake to view the Clause simply as a source of congressional authority to protect individual rights in original works. However, both Petitioner and the Eleventh Circuit obscure the crucial constitutional distinction at the heart of this case, considering the types of statutory protections afforded under the Copyright and Commerce Clauses, rather than focusing upon the nature of the intellectual property the statutes seek to protect. The crucial constitutional issue underlying this case is whether Congress' authority *to create rights in copyrightable original works* is limited to that granted under the Copyright Clause. The significance of the ruling below is that, for the first time, a court has found that copyrightable intellectual property, in this instance live musical performances, is not exclusively a matter of copyright authority.

We believe the court's ruling is in error in four different respects. First, the context and unique structure of the Copyright Clause strongly suggest the Framers intended to single out original works of authorship for special treatment under the law distinct from Congress' broader authority under the Commerce Clause. Second, the court misconstrues the significance of the fixation requirement and the important public purpose it serves. The court's evisceration of the fixation requirement is an unnecessary

and ill-considered departure from two centuries of copyright jurisprudence. Third, the court appears to completely misunderstand the concept of "simultaneous fixation," and, as a consequence, misapplies it's own constitutional test, concluding that 18 U.S.C. § 2319A is not "fundamentally inconsistent" with the fixation requirement. Finally, ironically, simultaneous fixation itself shows that Congress' authority under the Copyright Clause is wholly adequate to combat the type of conduct prohibited by 18 U.S.C. § 2319A, without undermining the important public purpose served by the Clause or fundamentally altering the constitutional structure among and between Congress' enumerated powers.

The issue before this Court is not whether, as the Eleventh Circuit stated, the Commerce Clause "may be used to accomplish that which may not have been permissible under the Copyright Clause." The issue here is whether Congress has the authority to legislate concerning rights in original works of authorship under any other source of authority except the Copyright Clause. It is our view that the Framers' intended, and more than two centuries of copyright law have understood, that Congress had no authority to create more expansive rights in original works than those authorized and clearly demarcated by the Copyright Clause. 18 U.S.C. § 2319A, creating exclusive rights in original works of authorship, plainly exceeds the scope of Congress' authority under the Copyright Clause and must, therefore, give way. We urge the Court to grant review in this case and reestablish the careful demarcation of authority created under the Copyright Clause by declaring this statute unconstitutional.

ARGUMENT

1. The Copyright Clause Establishes A Balance Of Interests Concerning A Specific Subject Matter (Original Works of Authorship) Designed, Foremost, To Benefit The Public

The Copyright Clause in Art. I, Sec. 8, Cl. 8 of the Constitution establishes a careful balance between conflicting public and private interests in a specific type of intellectual property. The Clause authorizes Congress to legislate "[t]o promote the Progress of Science and useful Arts," by creating a limited exclusive right to "Writings and Discoveries." As pertains to copyright, the term "Writings" has been interpreted to specify only original works of authorship as being within the scope of the Clause. Indeed, originality has been characterized as the "*sine qua non* of copyright." *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 348 (1990).

The Copyright Clause authorizes Congress to offer an author or inventor the exclusive right to reproduce and distribute their original works for a limited period, recognizing that the potential monetary reward derived from that right would encourage further innovation and scholarship in "Science and the useful Arts." It is generally understood that the Framers felt such a time-limited monopoly was a necessary evil to secure the broader public benefits of increased scientific and artistic innovation. "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation

must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see, generally*, Adam Smith, *The Wealth of Nations*, Book V, Ch. 1, Pt. III, Art. I., *text following heading titled*, "The grant of a temporary monopoly . . . may sometimes be reasonable, but a perpetual monopoly creates an absurd tax.".

In light of the complex balance of interests created under the Copyright Clause, it is a mistake to view the Clause simply as a source of congressional authority to protect individual rights in original works. As the Court stated in *Twentieth Century Music*, "[t]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good." *Twentieth Century Music*, 422 U.S. at 156. *See, also, United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary motivation for conferring the monopoly lie in the general benefits derived by the public from the labors of authors.") As such, the Copyright Clause does not create any moral or property right in an original work independent of the wider public purpose it serves. *See, generally*, Nimmer on Copyright, § 8D.01 (1999).

2. The Proceedings Below Erred In Separating The Protections Authorized Under Copyright Clause From The Limited Scope And Public Purpose Of That Clause

The proceedings below disembodied the rights and protections authorized by the Copyright Clause from the

subject matter it concerns. After the Government conceded that 18 U.S.C. § 2319A exceeded Congress' authority under the Copyright Clause, it asked the Eleventh Circuit panel to find that the statute was authorized under the Commerce Clause. The court, reviewing *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), considered whether the Copyright Clause constituted an exclusive or, rather, an alternative source of authority to create "copyright-like protection." *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) (henceforward, App. 24). The court first examined the *Trademark Cases*, 100 U.S. 82 (1879), in which this Court considered a challenge to an 1876 statute creating copyright-like protections for trademarks. The Court first asked whether the subject matter of the statute, trademarks, was copyrightable. *Id.* 100 U.S. at 93-94. Once the Court concluded that trademarks were not original works subject to copyright, it then considered whether the Commerce Clause might serve as an alternative source of authority to enact the statute. *Id.* 100 U.S. at 95. Although the Court struck down the statute in that case, it concluded that the Commerce Clause might authorize legislation creating rights in uncopyrightable intellectual property. *Id.* 100 U.S. at 96-97.

The Eleventh Circuit's opinion below actually inverts the *Trademark Cases* holding, citing it for the more general proposition that "Congress is [not] automatically forbidden from extending protection under some other grant of legislative authority to works that may not be constitutionally protectable under the Copyright Clause." (App. 20.) The accuracy of this gloss depends upon the definition of the terms "not . . . constitutionally protectable under the Copyright Clause." The 1876 statute before the

Trademark Cases Court concerned trademarks – unoriginal works – which are not "constitutionally protectable under the Copyright Clause" because they exceed the specific subject matter of the Clause, namely, original works of authorship. On the other hand, 18 U.S.C. § 2319A concerns "live musical performances," original works which are, without question, subject matter within the purview of the Copyright Clause. 17 U.S.C. § 102(a)(2) (identifying "musical works, including any accompanying words" as "original works of authorship"). Thus, live musical performances are clearly "constitutionally protectable under the Copyright Clause," although, unless they are fixed, they are not, in fact, copyrighted. 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . . "). A more accurate characterization of the holding in the *Trademark Cases* would be, "Congress is [not] automatically forbidden from extending protection under some other grant of legislative authority to works *beyond the subject matter of* the Copyright Clause." The *Trademark Cases* says no more than this and, for this reason, the court's reference to the *Trademark Cases* is inapposite to the issue before this Court.

Turning to the issue before this Court, Petitioner's Question Presented For Review is, unfortunately, equally imprecise. "Can Congress create copyright protections by way of the Commerce Clause that it cannot create by way of the Copyright Clause?" (Petitioner's Br. 10.) Again, the proper response depends upon the definition of an imprecise term, in this case, "copyright protections." As the court below noted, the Lanham Act affords a trademark holder exclusive rights and remedies for infringement quite similar to those afforded a copyright holder

and does so wholly under Congress' Commerce Clause authority, as required by the holding in the *Trademark Cases*. (App. 20, 23); *see also*, 15 U.S.C. §§ 1052, 1116-1120 (providing remedies for infringement of an exclusive right in a trademark). Indeed, insofar as the Lanham Act permits infringement claims, the protections afforded under the Act are more akin to "copyright protections" than the preemptive criminal prohibitions found in 18 U.S.C. § 2319A, which plainly exceed the scope of the Copyright Clause.

Both Petitioner and the Eleventh Circuit inadvertently obscure the crucial constitutional distinction at the heart of this case, considering the types of statutory protections afforded under the Copyright and Commerce Clauses, rather than focusing upon the nature of the intellectual property the statutes seek to protect. The Lanham Act concerns unoriginal works, trademarks, and thus Congress has no authority to create rights in that property under the Copyright Clause. The *Trademark Cases* determined that Congress has authority to do so under its Commerce Clause authority. In contrast, 18 U.S.C. § 2319A concerns live musical performances which constitute original works of authorship. Congress has the authority to create rights in these works under the Copyright Clause. Nevertheless, 18 U.S.C. § 2319A clearly exceeds the scope of authority granted under the Copyright Clause. Therefore, the crucial constitutional issue underlying this case is whether Congress' authority to create rights in copyrightable original works is limited to that granted under the Copyright Clause. The significance of the ruling below is that, for the first time, a court has found that copyrightable intellectual property, in this instance live musical performances, is not exclusively a

matter of copyright authority, but rather may be regulated under the Commerce Clause where the Copyright Clause proves too limited.

3. The Real Question Before This Court: Is The Copyright Clause The Sole Source Of Congressional Authority To Create Exclusive Rights In Copyrightable Intellectual Property?

In the ruling below, the Eleventh Circuit concluded that the Copyright Clause is not Congress' exclusive source of authority to legislate concerning copyrightable original works. We believe the court's ruling is in error in four different respects. First, the context and unique structure of the Copyright Clause strongly suggest the Framers intended to single out original works of authorship for special treatment under the law distinct from Congress' broader authority under the Commerce Clause. Second, the court misconstrues the significance of the fixation requirement, effectively abandoning it, an unnecessary and ill-considered departure from two centuries of copyright jurisprudence. Third, the court appears to completely misunderstand the concept of "simultaneous fixation," and, as a consequence, misapplies it's own constitutional test, concluding that 18 U.S.C. § 2319A is not "fundamentally inconsistent" with the fixation requirement. Finally, ironically, simultaneous fixation itself shows that Congress' authority under the Copyright Clause is wholly adequate to combat the type of conduct prohibited by 18 U.S.C. § 2319A, without undermining the important public purpose served by the Clause or fundamentally altering the constitutional structure among and between Congress' enumerated powers. For these reasons, we urge the court to grant certiorari in this

case, reverse the Eleventh Circuit decision, and find 18 U.S.C. § 2319A unconstitutional.

A. The Copyright Clause Evinces The Framers' Intention To Confer A Special Legal Status Upon Original Works Of Authorship And Set Them Apart From Congress' Broader Authority To Regulate Commerce

As outlined above, the Copyright Clause fashions a balance of interests which simultaneously creates a proprietary right in original works and limits the duration of that right, all for the expressed purpose of furthering the public interest in having broad access to these works. The Clause sets out explicit limits regarding the duration and subject matter of copyright protection, evidence that the Framers made a deliberate decision to delimit the scope of rights inhering in original works of authorship to those articulated in the Copyright Clause itself. The fact these limited rights exist to maintain a balance between public and private interests strongly suggests that more extensive exclusive rights created under the Commerce Clause are inimical to the Framers' purpose in fashioning the balance in the first place.

Furthermore, the Copyright Clause is unique among the Enumerated Powers in that it contains an explicit statement of purpose justifying and limiting the exercise of legislative authority thereunder. The fact that these qualifications are enshrined as part of our fundamental law suggests that the Framers made a deliberate decision to prevent Congress from enacting broader rights concerning original works under its more general legislative powers. After all, the Framers could have given broader

scope to Congress' legislative authority regarding original works of authorship. The fact that they did not, but rather fashioned a balance of interests under the Copyright Clause, strongly suggests that the Framers intended to create a special legal status for original works of authorship which would serve to insulate those works from Congress' broader authority under the Commerce Clause.

In contrast, the Commerce Clause is an open-ended grant of authority lacking the specificity of scope, purpose, and duration which the Copyright Clause contains. It seems inconceivable that the Framers would have troubled with carefully limiting the scope of rights created in original works under the Copyright Clause had they intended that Congress could create more extensive rights in original works pursuant to its authority under the Commerce Clause. *See, generally,* Tribe, American Constitutional Law, 2d Ed., Chap. 5, § 5-7, fn. 2 (1988) (suggesting congressional abuse of commerce power may best be determined by identifying core values protected by other constitutional provisions and "fencing Congress out" from exercising its commerce power where it would undermine these values).

B. Contrary To The Holding Below, The Fixation Requirement Is A "Fundamental Criteria" Of Copyright Law And Of Central Importance To Furthering The Public Interest Served By Copyright

The 1976 Copyright Act identifies "originality and fixation" as the two "fundamental criteria of copyright protection" accorded pursuant to the Copyright Clause.

17 U.S.C. § 102(a) and Notes of Comm. on the Judiciary, H. R. Rep. No. 1476, 94th Cong. (1976) ("The two fundamental criteria of copyright protection – originality and fixation in tangible form – are restated in the first sentence of this cornerstone provision."); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-1101 (1994)). The fixation requirement is understood to be implicit within the use of the term "Writings" in the Copyright Clause. *Goldstein v. California*, 412 U.S. 546, 561 (1973) ("[W]ritings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."). Just as the "originality" requirement is the threshold inquiry to determine whether a type of intellectual property is *copyrightable*, the "fixation" requirement determines whether copyrightable intellectual property has, in fact, been *copyrighted*. 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . . "). Therefore, contrary to the Eleventh Circuit's contention that "fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power," there is simply no copyright protection without fixation. 17 U.S.C. §§ 101-102, Notes of Comm. on the Judiciary, *supra*, "Fixation in a Tangible Form." ("The two essential elements – original work and tangible object – must merge through fixation in order to produce subject matter copyrightable under the statute.")[3]

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[3] Under the 1976 Copyright Act, "subject matter copyrightable under the statute" is a subset of that which is copyrightable under the Copyright Clause, as may be seen in the sentence preceding: "It is possible to have an "original work of authorship" without having a "copy" or "phonorecord"

The Eleventh Circuit opinion does not recognize any substantive content within the fixation requirement. Nonetheless, fixation furthers copyright's broader public purpose in two important respects. First, fixation restricts copyright protection to the tangible expression of original works rather than to the ideas underlying those works. 17 U.S.C. § 102(b) (codifying "idea/expression dichotomy" from common law). In this manner, fixation safeguards the public interest in maintaining a free and public market of ideas. *See, generally,* Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision,* 67 Geo. Wash. L. Rev. 359, 362-365 (1999) (outlining jurisprudence recognizing "idea/expression dichotomy" and public right to free access to ideas). The codification of the "fair use doctrine" within copyright law underscores the importance of this free and public market of ideas to the overall copyright scheme. 17 U.S.C. § 107. Together, the idea/expression dichotomy and the fair use doctrine further counterbalance an individual's exclusive right to her original works, in favor of public access. Sobel, *Bootleggers Beware: Copyright Law Now Protects Live Musical Performances, But New Law Leaves Many Questions Unanswered,* 17 Ent. L. Rep. 1, 9, fn. 45 (July 1995).

Bereft of any fixation requirement, the idea/expression distinction will likely blur beyond recognition and the awkward structure of rights and duties created under copyright will lose much of its coherence. As the opinion

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embodying it . . . " This brief consistently identifies fixed original works (the Act's "subject matter copyrightable under the statute") as "copyrighted" works and unfixed original works as "copyrightable" works.

below blithely states, "[e]xtending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author." (App. 24.) Would this expansive reading of the Copyright Clause not also permit extending quasi-copyright protection to the ideas expressed in these unfixed performances? The court offers no self-regulating principles which might constrain quasi-copyright protection from any sphere currently under copyright.[4] *See, generally,* Nimmer, *The End of Copyright,* 48 Vand. L. Rev. 1385-1387, 1399-1401, 1411-1416 (1995).

In addition to maintaining the more esoteric idea/expression dichotomy, fixation promotes the concrete and public purpose of preserving original works. Fixation is the affirmative act required of an author or creator in exchange for the benefits of an exclusive right to that work. The creator of the work must also preserve the fixed copy – indeed, register a copy with the Copyright Office – if she is to maintain an enforceable exclusive right in the work. 17 U.S.C. § 411(a) (mandating registration as a jurisdictional requirement to bring an infringement action). Thus, importantly, though perhaps incidentally, the fixation and preservation of an original work increases the likelihood that the work will eventually become accessible to the public. This is of particular

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[4] The court posits a kind of quasi-fixation requirement to justify extending "quasi-copyright protections," reasoning, " . . . although a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed." (App. 24.) *Amicus,* however, can ascertain no clear meaning from this assertion.

importance when considering live musical performances. Unlike most types of original works, live musical performances are ephemeral works which, unless fixed at the time of performance, are lost to all but the immediate audience at the moment each note fades. Public access, both scholarly and recreational, is only possible if these performances are fixed. By prohibiting the unauthorized fixation of any live musical performance, 18 U.S.C. § 2319A grants performers an exclusive right to control access to a performance without requiring any affirmative act by the performer to fix and preserve the performance herself. Nimmer, *The End of Copyright*, *supra*, at 1409. Moreover, this right is both perpetual and retroactive. Nimmer on Copyright, *supra*, § 8E.03(c)(2). The practical effect of the statute is that live musical performances will not be fixed at all and so the performances often will be lost to the public forever. There are numerous examples of both authorized and unauthorized fixations later becoming available to the public which, under the broad preemptive right created by this statute, would most likely have never been fixed, or later discarded.[5]

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[5] There are a number of celebrated examples of unauthorized copies, bootlegs, which have gained unquestioned cultural significance over time. For instance, unauthorized recordings made of various arias from the 1901-1903 seasons at the New York Metropolitan Opera remain the only extant recordings of several of the prominent performers of the day. Many of William Shakespeare's own plays appear to have been originally compiled and preserved surreptitiously by audience members and actors. Clinton Heylin, *Bootleg: The Secret History of the Other Recording Industry*, 17-19 (1994).

Finally, fixation may be understood to support a general public right to have access to uncopyrighted original works. The Copyright Clause affords performers an exclusive right to their original fixed works only as a means to encourage further creativity and public access to the fruits of this labor. This limited, qualified, right constitutes a carefully defined exception to the general rule that both ideas and expression, once made public, fall within the public domain. "The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become after voluntary communication to others, free as the air to common use." *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Justice Brandeis, *dissenting*).

C. The Eleventh Circuit Decision Further Misconstrues The Significance Of Simultaneous Fixation, Minimizing The Importance Of Fixation Overall, And, Consequently, Misapplies It's Own "Fundamentally Inconsistent" Test

Simultaneous fixation requires a would-be copyright holder to fix any broadcast or transmission of a live performance simultaneous with its transmission. 17 U.S.C. § 101. The authorized fixation confers copyright protection to the work and will be deemed to have preceded any unauthorized fixation made of either the performance or its transmission. As such, simultaneous fixation is simply the logical application of the fixation requirement to live broadcasts.

The Eleventh Circuit decision misinterprets the purpose and significance of fixation as a whole and

simultaneous fixation in particular. "Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause . . . [q]uite to the contrary, [it] actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause." (App. 24.) The court considers this conclusion "bolstered" by the example of simultaneous fixation.

> While we are aware that the constitutionality of [simultaneous fixation] has never been tested, the ease with which it has been incorporated into the prior copyright law suggests that fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power. Indeed, if a performer under the prior law could effectively protect a live musical performance, *circumventing the fixation requirement, simply by the device of simultaneous recordation,* the anti-bootlegging law seems to us like more of an incremental change than a constitutional breakthrough.

(App. 25) (emphasis added).

Of course, simultaneous recordation *is* fixation and thus does not "circumvent" the fixation requirement, but rather fulfills it. Nor should it seem remarkable that simultaneous fixation "has been incorporated into prior copyright law" since it is simply the application of the fixation requirement to live broadcasts. Operating under a basic misapprehension of copyright law, the court mistook a constitutional breakthrough for an "incremental change," and, unable to ascertain any purpose to the fixation requirement, felt free to discard it as meaningless.

It is a constitutional breakthrough nonetheless. As outlined above, fixation encourages the preservation and distribution of works which might otherwise be lost to the public forever. Indeed, this is the absurd result achieved by 18 U.S.C. § 2319A. Under the statute a performer has no affirmative duty to fix and preserve the performance, but receives a perpetual, retroactive, exclusive right to any sound recording or transmission of the performance. The statute undermines copyright's primary purpose, granting broader exclusive rights in original works than permitted under the Copyright Clause, without furthering the public interest those rights were designed to serve. By upholding the statute, the Eleventh Circuit has permitted the Commerce Clause to intrude upon the subject matter of the Copyright Clause, to exceed the scope of rights permitted under the Copyright Clause, and to undermine the public purpose served by the Copyright Clause. It is difficult to imagine a statute more fundamentally inconsistent with existing copyright law.

D. Simultaneous Fixation Shows Congress' Authority Under The Copyright Clause Is Wholly Adequate To Combat The Conduct Prohibited By 18 U.S.C. § 2319A Without Extending Commerce Clause Authority to Copyrightable Intellectual Property

Ironically, Congress might easily have achieved the purpose of 18 U.S.C. § 2319A simply by amending existing copyright law to expand the definition of fixation to include simultaneous fixation of live musical performances. The scope of the right granted thereunder would

be of limited duration, but it would avoid the wholesale assault on the Copyright Clause currently advocated by the Government. More importantly, consistent with the purpose espoused within the Copyright Clause, such an amendment would increase the likelihood that performances would be fixed and preserved, creating greater opportunity for future distribution of these original works for public study and enjoyment. With an adequate remedy so near at hand within existing copyright law, it seems especially ludicrous to seek to discard the fixation requirement, upending more than two centuries of copyright in the process.

CONCLUSION

For the foregoing reasons, the pending Petition for Writ of Certiorari should be granted, the Eleventh Circuit decision reversed, and 18 U.S.C. § 2319A found unconstitutional.

Respectfully submitted,

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